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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1441

JOSEPH PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. ——

JOSEPH PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, JOSEPH PHILLIPS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 19, 1973.

OPINION BELOW

The Opinion and Order of the Court of Appeals, not yet reported, appears in the Appendix hereto at Pages A-1 to A-4. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 19, 1973. A timely Petition for Rehearing was denied on April 11, 1973, and this Petition for a Writ of Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a search without a warrant was unreasonable and violative of the Sixth Amendment where federal agents in the Chicago metropolitan area received information from a previously reliable informant, four hours prior to a plane's arrival, while it was already airborne, at a time when a state's magistrate would have been available to issue a search warrant, that three named and described individuals were aboard a flight to Chicago with three described suitcases containing marijuana which had been checked with identified baggage claim numbers.

2. Whether a search by federal agents, incident to a lawful arrest and without a search warrant, of closed suitcases found in the back seat and trunk of an automobile at a time when all of the occupants had been removed from that automobile, handcuffed and placed in a government vehicle went beyond the permissible scope defined in *Chimel* v. *California*, 395 U.S. 452, 89 S. Ct. 2034.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be searched.

STATUTORY PROVISIONS INVOLVED

Title 21, Section 841 (a), U.S.C.A., states:

§ 841. PROHIBITED ACTS A-UNLAWFUL ACTS.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or, (2) to create, distribute, or dispense, or possess with intent distribute or dispense, a counterfeit substance.

Title 18, Section 111, U.S.C.A., states:

§ 111. ASSAULT, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES.

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any persons designated in § 1114 of this Title, while engaged in or on account of the performance of his official duties shall be fined not more than $5,000 nor imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 nor imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

The Petitioner was convicted of possession of marijuana in violation of 21 U.S.C., Section 841 (a) (1) and of assaulting a federal officer in violation of 18 U.S.C., Section 111. The Petitioner was sentenced to four years on Count I and three years on Count II to run concurrently. The Court of Appeals affirmed, and a Petition for Rehearing was denied.

The facts are undisputed:

On the afternoon of September 22, 1971, the Defendant, Joseph Phillips, was in St. Louis, Missouri. He had been driving a 1962 maroon Rolls Royce from Tucson, Arizona to New York City for delivery to Kirsch Chevrolet, the owner of the automobile. Mr. Phillips had been delayed in St. Louis, but was preparing to leave that evening to continue his trip on to New York.

Just prior to his leaving Mr. Phillips had a telephone conversation with one Thomas Yocky. Yocky told him that he had been stranded in Tucson, Arizona, and did not have sufficient funds to continue his trip to New York by plane. He asked Phillips if it would be possible to obtain a loan sufficient to pay the air fare from Tucson to New York City. Mr. Phillips refused to loan him any money, but told Yocky that he would be willing to take him as a passenger the rest of the way to New York if he could get to St. Louis that evening.

Later that same day Yocky again called and notified Phillips that he had missed the plane to St. Louis, but would be able to get a late evening flight out of Tucson that would arrive in Chicago at about 6:15 a.m. the next morning. The two then arranged to meet at a specific hotel near the airport and drive on to New York.

Mr. Phillips drove to Chicago. However, when he arrived, he found that the hotel had been oversold so that he was unable to get in. He checked into another hotel in the neighborhood of the airport. As a consequence, Phillips decided to meet the flight on which Yocky was arriving to avoid missing him. He drove to the lower level of O'Hare Airport, arriving at about 6:00 a.m. on the morning of September 23, 1971.

Meanwhile, at about 2:30 a.m. Chicago time on the morning of September 23, 1971, (about one-half hour after the flight had left Tucson) United States Customs Agent Donald Clements obtained information from a previously reliable informant that three individuals were aboard American Airlines Flight No. 246 which was scheduled to arrive at Chicago's O'Hare Airport at approximately 6:30 a.m. The informant identified by description the individuals concerned. The agent was further informed that the travelers had checked aboard the plane suitcases containing a substantial amount of marijuana. He also described those suitcases in which the marijuana was being kept, and even supplied the airline claim check number for each of them.

Approximately one hour later, at 3:30 a.m., Special Agent Bushendorf of the Federal Bureau of Narcotics and Dangerous Drugs in Chicago was notified by his Supervisor of the impending arrival. He was furnished with a description of the three suspects, together with a description of the suitcases and the claim check numbers.

Agent Bushendorf at once proceeded from his home to O'Hare Airport and arrived at approximately 5:00 a.m. Several other agents were already on the scene. A total

of eight to ten agents eventually participated in the subsequent events.

Although the identifiable suitcases had been on the airplane since at least 2:30 a.m. Chicago time, and there remained at least one hour before the plane was scheduled to arrive in Chicago, no effort was made to obtain a warrant for the search of the suitcases or the arrest of the subjects. A judge of the Circuit Court of Cook County is on duty twenty-four hours a day for any emergency action, including the issuance of search and arrest warrants. Agent Bushendorf testified that on prior occasions he had procured search warrants late at night and in the early morning hours.

A meeting was held with airport personnel. The agents set up a surveillance of the gate at which the plane was scheduled to de-bark and of the lower level American Airlines baggage area.

When the plane landed, three persons fitting the informant's description were seen by the agents to arrive at Gate K-2 on the upper level. Those three were subsequently identified as Mr. Lancia, Mr. Yocky and a Miss Harnett. They were all followed to the lower level of the airport, where they waited at the American Airlines baggage area. At the same time other agents intercepted the airline truck bringing the baggage in from the plane, located the suspect suitcases and determined that the claim check numbers on the bags matched the numbers furnished by Agent Clements.

While Mr. Yocky, Mr. Lancia and the young lady were waiting for their luggage the agents deployed outside the lower level of the terminal and set up further surveillance. Agent Bushendorf, however, remained inside and maintained a constant watch on the baggage area and the suspects.

In a few moments Mr. Phillips drove up outside American Airlines and parked the Rolls Royce. He was observed to enter the terminal lower level and meet with Miss Harnett briefly. The two then left the terminal and entered the car. Miss Harnett got in the back seat and Mr. Phillips got into the driver's seat for a short time. However, the car would not start because the battery was dead, so Mr. Phillips re-entered the terminal and placed a telephone call for a tow truck.

When the baggage arrived, Mr. Lancia and Mr. Yocky picked up the three suitcases and turned them over to a sky cap who took them out to the Rolls Royce and placed them on the sidewalk. During all this period the subjects were being watched by eight to ten agents, all of whom were within fifty or sixty feet of the car.

The tow truck arrived and started the automobile. Mr. Phillips paid the repair man in cash from a large roll of bills that he was carrying. Two of the suitcases were then placed in the trunk of the Rolls Royce and one was placed in the back seat. The four individuals entered the car, with Phillips behind the wheel, and prepared to leave the airport.

Agent Bushendorf gave a prearranged signal and began walking toward the car. He held his badge in his right hand and, as he approached, called twice, "Federal Agents, halt." On that signal, most of the other agents in the immediate vicinity also began walking toward the Rolls Royce from all directions. At least two of the other agents had their badges out and shouted "Federal Agents."

Mr. Phillips testified without contradiction that he was unable to hear the agents announce their office. The windows of the automobile were closed tight. The motor

was running and there were jet planes coming and going immediately overhead. Phillips further testified that just as he was about to leave, he turned to his right and saw a "hippie looking" man approaching the automobile carrying what appeared to be a gun in his hand. As a result, Phillips panicked. He put the car in motion and veered to the left to get away. As he did so, one of the car fenders grazed Agent Kildow, who had been approaching from the left front. In attempting to avoid Agent Kildow, Mr. Phillips then swung the car to the right where Agent McNamara was standing. He jumped out of the way.

Several of the agents immediately began firing at the departing vehicle although no shots had been, or were being fired from inside the car. (As a matter of fact there were no weapons in the Rolls Royce.) The Defendant sped toward the parking lot in order to find help. He was pursued by a number of agents in government vehicles. Approximately one mile from the terminal, on the road to the parking lot, one of the government cars caught up with the Rolls Royce and pulled along side. The agent on the passenger's side placed his badge against the window so that it could be seen in the other car, and Mr. Phillips stopped the Rolls Royce immediately.

Several agents removed Mr. Phillips and his three passengers from the car, searched them for weapons, handcuffed them, and placed them in the government vehicle. After all of the suspects had been "secured", a search was made of the interior of the Rolls Royce. The closed suitcase in the back seat was opened first and some marijuana was found inside. The agents then opened the trunk and removed the remaining two suitcases. Both were opened and one was found to contain additional marijuana.

At no time did any of the parties give permission to the agents to open the trunk or to open any of the suitcases; and at no time was a search warrant sought or obtained for the search of the three suitcases.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Constitutes A Clear Misconstruction Of The Search Warrant Requirements Of The Fourth Amendment To The Constitution Of The United States.

The courts of the United States have been virtually uniform in holding that searches without a warrant are, in and of themselves, unreasonable and violative of the Fourth Amendment with a few specific rare exceptions. *Jones* v. *U.S.A.*, 357 U.S. 493, 78 Sup. Ct. 1253, 1256; *Brinegar* v. *U.S.A.*, 338 U.S. 160, 174, 69 Sup. Ct. 1302, 1310; *Agnello* v. *U.S.A.*, 269 U.S. 20, 32, 46 Sup. Ct. 4, 6.

Thus in *Katz* v. *U.S.A.*, 389 U.S. 347, 88 Sup. Ct. 507, this Court stated:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole grounds that officers reasonably expected to find evidence of a particular crime and

> voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful * * * 'For the Constitution requires that the deliberate impartial judgment of a judicial officer * * * be imposed between the citizen and the police * * *.' * * * Searches conducted outside the judicial process without prior approval of judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject to a few specifically established and well delineated exceptions." (389 U.S. 356, 88 Sup. Ct. 514).

Moreover, those exceptions are "jealously and carefully drawn", *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455, 91 Sup. Ct. 2022, 2032; *Jones* v. *U.S.A.*, 357 U.S. 493, 499, 78 Sup. Ct. 1253, 1257. Nor is it the responsibility of the Defendant to show that the search warrant was required. Quite the contrary, it is always the burden of the Government to show clearly and explicitly those exigent circumstances that made it necessary to conduct the search without a warrant. *U.S.A.* v. *Jeffers*, 342 U.S. 48, 51, 72 Sup. Ct. 93, 95; *McDonald* v. *U.S.A.*, 355 U.S. 451, 455, 69 Sup. Ct. 191, 193.

The events that occurred during the early morning hours of September 23, 1971 constitute, it is respectfully submitted, a veritable textbook example of the circumstances under which a warrant should have been obtained. Government agents had ample probable cause as early as 2:30 a.m. They had been furnished by a reliable informant with a particularized description of a place to be searched (the suitcases), even including the baggage claim check numbers; and with a specific description of the articles to be seized (marijuana). The Constitutional requirements for the issuance of a search warrant were, then, present almost four hours prior to the plane's landing.

Additionally, eight to ten agents had assembled at O'Hare Field more than one hour prior to the scheduled arrival of the subject flight. Clearly it would have been a simple matter for the agent in charge to have dispatched someone to procure a warrant. O'Hare Field is within a ten minute drive of several Chicago suburban communities; and, at that hour of the morning, even a round trip to the Chicago Loop would have taken certainly no more than one hour.

Rule 41 (a) of the Federal Rules of Criminal Procedure, authorizes the issuance of a search warrant by a "Judge of the United States or of a State, Commonwealth or territorial Court of Record or by a United States Commissioner within the district wherein the property sought is located." Consequently, it was not essential that a federal judge issue the warrant. There is a judge of the Circuit Court of Cook County on duty twenty-four hours a day for just such an emergency action. Nonetheless, the Court below concluded that the requirement of a warrant was excused solely by virtue of the subsequent unimportant and accidental fact that the suitcases found their way into an automobile. The Court's principal error, it is suggested, was in focusing on the automobile rather than the suitcases.

The automobile did not even enter into the picture until some four hours after the agents had ample probable cause to obtain a warrant for a search of the suitcases. The car, then, is totally irrelevant to the critical issue. Once the agents had a warrant for the search of the suitcases, the place or conveyance in which those suitcases were ultimately found was of no moment whatever.

Nor is it at all germane that the agents may have been inconvenienced or may even have had grave difficulty in finding a judge or magistrate to issue the warrant at that hour of the morning. As this Court said in *McDonald* v. *U.S.A.*, 335 U.S. 451, 455, 69 Sup. Ct. 191, 193:

> "No reason except inconvenience of the officers and delay in preparing papers and getting before a Magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement, * * *.
>
> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed the Magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities, it was done so that an objective mind might waive the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose jobs are the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a Magistrate to pass on the desires of police before they violate the privacy of a home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigent seize of the situation make that course imperative."

II. The Decision Below Erroneously Concludes That A Warrantless Search Incident To A Lawful Arrest May Be Extended So As To Permit The Opening Of Closed Suitcases Found In The Back Seat And Trunk Of A Seized Automobile.

The scope and extent of any warrantless search incident to a lawful arrest is now controlled by the criteria

this Court announced in *Chimel* v. *California,* 395 U.S. 752, 769, 89 Sup. Ct. 2034, 2040:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape. * * * In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items, must, of course, be governed by a like rule. * * * There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

After the subject automobile was curbed, all of the occupants were removed from the car, handcuffed and placed in a government vehicle in the custody of agents. It was then, and only then, that the search of the Rolls Royce began. One suitcase was found in the back seat and two cases were found in the locked trunk. All of the baggage was taken into the custody of the federal agents and opened without a warrant. This, notwithstanding that it would have been physically impossible for any of the individuals in custody to have reached either the automobile or the suitcases for the purpose of destroying evidence or obtaining a weapon. Significantly the arrestees had already been searched for weapons and none had been found.

The Court below, though, erroneously reasoned that this Court in *Carroll* v. *U.S.A.*, 267 U.S. 132, 45 Sup. Ct. 280 and *Chambers* v. *Maroney*, 399 U.S. 42, 90 Sup. Ct.

1975, has sanctioned warrantless searches of all vehicles merely because they are movable. That theory was recently specifically rejected in *Coolidge* v. *New Hampshire*, 403 U.S. 43, 91 Sup. Ct. 2022. In that case, it was pointed out that the mobility of a vehicle is merely another factor to be taken into consideration in determining whether or not there existed sufficient exigent circumstances to excuse the normal requirement for a search warrant.

> "The underlined rationale of *Carroll* and of all the cases that have followed, it is that there is 'a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motorboat, wagon or automobile for contraband goods, *where it is not practicable to secure a warrant*, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant was sought.' * * * As we said in *Chambers*, *supra*, at 51, 90 Sup. Ct. at 1981, 'Exigent circumstances' justify the warrantless search of 'an automobile *stopped on the highway*,' where there is probable cause, because the car is 'movable, the occupants are alerted and the car's contents may never be found again if a warrant must be obtained' '(t)he opportunity to search is fleeting * * *.' (emphasis supplied)" (403 U.S. 459, 460, 91 Sup. Ct. 2034, 2035).

This Court's reasoning in Note 18 at 403 U.S. 461, 91 Sup. Ct. 2035 is particularly applicable to the case at bar:

> "But given the virtually universal availability of automobiles in our society, there is little difference between driving the container itself away and driving it away in a vehicle brought to the scene for that purpose. Of course, if there is a criminal suspect close enough to the automobile so that he might get a weapon from it or destroy evidence within it, the police may make a search of an appropriately limited

> scope * * *. But if *Carroll* * * * permits an unwarranted search of an unoccupied vehicle on private property and beyond the scope of a valid search incident to an arrest, *then it would permit as well a warrantless search of a suitcase or a box. We have found no case that would suggest such an extension* * * *." (emphasis added).

Obviously, then, since it was physically impossible for any of the Defendants or their associates to reach the suitcases for any purpose, the search of those suitcases without a warrant was clearly beyond permissible bounds and, therefore, constitutionally prohibited.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
March 19, 1973

Before

Hon. Luther M. Swygert, Chief Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Argued January 26, 1973

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. Nos. 72-1542 and 72-1738 JOSEPH PHILLIPS and THOMAS YOCKY, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 71 CR 1012 THOMAS R. McMILLEN, Judge.

ORDER

In separate but consolidated appeals defendants Joseph Phillips and Thomas Yocky each urged error in (1) the denial of their motions to suppress evidence, (2) the denial of their motions for judgments of acquittal for insufficient evidence and 3) denial of their motions for severance.

Both defendants were convicted after a jury trial for possession of marijuana in violation of 21 U.S.C. § 841 (a) (1) and Phillips was also convicted of assaulting a federal officer in violation of 18 U.S.C. § 111. Yocky was committed for supervision and Phillips was sentenced to four years on the first count and three years on the second to run concurrently.

We have examined the record, have found defendants' arguments to be without merit and affirm the convictions. We shall discuss only the more significant of defendants' contentions.

A warrantless search of an automobile ordinarily raises thorny questions. The 46 pounds of marijuana seized here constituted contraband within the statutory definition. 49 U.S.C. §§ 781 (b) (1) and 787 (d); 21 U.S.C. § 812, Schedule I (c). The Supreme Court said in *Carroll* v. *United States*, 267 U.S. 132, 153, 155-56 (1925):

> " . . . [C]ontraband goods concealed and illegally transported in an automobile or other vehicle may be searched without a warrant . . . [and seized].
>
> " . . . The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein which is being illegally transported."

A United States customs agent received information at Nogales, Arizona, at 2:10 A.M., Chicago time, on September 23, 1971, from a previously reliable informant that three named and described persons had boarded American Airlines Flight 246 bound for Chicago with three described suitcases which had been checked with identified numbered baggage claim tickets. The informant also told the customs agent that he believed that these were in possession of a large quantity of marijuana contained in the suitcases. At the time of the telephone call

from the informant, the flight had left Tucson. The agent called a federal agent in Chicago at 2:40 A.M. and gave him the same information.

At the suppression hearing, the following "underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable' " (*Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964)) were testified to by the customs agent: the informant gave information in the first case in April, 1971, resulting in the recovery of 60 or 70 pounds of marijuana; his information in May, 1971, resulted in recovery of 7 pounds; two tips in August, 1971, resulted in recoveries of 70 and 40 pounds; a fifth tip in September, shortly prior to the tip in the present case, resulted in recovery of 42 pounds. The reliability of the present tip was confirmed when the three persons using the names and bearing the descriptions given did arrive on the specified flight with three suitcases of the specified description and claim check numbers.

The several agents at the Chicago airport had probable cause to arrest the three persons whose identities had been sent from Arizona. They attempted the arrest when they approached defendant Phillips' automobile with their badges in their hands and announced that they were federal agents. At that point, Phillips drove off, knocking down one agent and almost striking another. Flight, at least, is enough evidence of consciousness of guilt to supply adequate probable cause. *Cf. Miller* v. *United States*, 320 F. 2d 767, 770 ff., and 775 (D.C. Cir. 1963). Flight and the assault created probable cause for arresting Phillips as well as the three persons from Arizona. The totality of facts at that point justified the search for and seizure of the contraband, which followed immediately after the arrests.

The convictions are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
April 11, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 72-1542 JOSEPH PHILLIPS, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (71 CR 1012)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1441

JOSEPH PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the warrantless search of suitcases (which the officers had probable cause to believe contained marihuana) found in his automobile at the time of his arrest.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of marihuana, in violation of 21 U.S.C. 841(a)(1), and of assaulting a federal officer, in violation of 18 U.S.C. 111. He was sentenced to four years' imprisonment on the first count, and to three years' imprisonment on the second count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 17-19).

1. At approximately 2:30 a.m., Chicago time, on September 23, 1971, a United States Customs Agent

in Arizona received information from a reliable informant that three persons in possession of a large quantity of marihuana had boarded an airplane in Arizona bound for Chicago (S. Tr. 9-11).[1] The informant described the baggage, gave the claim tickets' numbers, and furnished a physical description and the names of the three individuals (Tr. 7, 37-38). The agent contacted his liaison officer, who, in turn, contacted agents in Chicago (Tr. 4-5; S. Tr. 9-10). The group supervisor in Chicago contacted Agent Bushendorf at his home and relayed the information at 3:30 a.m. (S. Tr. 11). Agent Bushendorf was told that the flight was scheduled to arrive at 6:00 or 6:15 a.m. (S. Tr. 9). He contacted other agents and arranged to meet them at 5:30 at O'Hare Airport (Tr. 5, 9, 31).

Upon arrival at the airport three of the agents went to the baggage claim area to observe the unloading (Tr. 5-7). The suspects' suitcases with the designated claim numbers were observed by agents (Tr. 8). Other agents went to the baggage area and observed two men and a woman who appeared to fit the descriptions given by the informant (Tr. 10-11, 197). The suspects disembarked from the aircraft and the men went to the claim area (Tr. 12-13). The woman was greeted by petitioner (Tr. 11-12, 200-201). Together they left the terminal and went to a maroon 1962 Rolls Royce Classic (Tr. 12). The two men who had been waiting in the baggage claim area picked up the suitcases and brought them to the Rolls Royce (Tr. 13, 33-34). Two

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[1] "S. Tr." refers to the transcript of the proceedings on the motion to suppress on April 6, 1972.

"Tr." refers to the transcript of the proceedings at trial contained in six volumes paginated consecutively.

of the suitcases were placed in the trunk and one in the back seat (Tr. 15).

As petitioner entered the car and closed the car door, four agents converged on the vehicle (Tr. 16, 173, 206-217, 274). Three of the agents shouted "Federal Agents" and all four displayed their credentials (Tr. 16-18, 115). None of the agents had their guns drawn (Tr. 104). Petitioner then accelerated the car and bolted forward (Tr. 22, 227). The vehicle swerved to the left, knocked one of the agents to the ground and swerved to the right toward another agent who jumped to safety (Tr. 22, 177, 212, 214). The agents then pursued petitioner in two vehicles and apprehended him approximately one-half mile from the airport (Tr. 181). One agent made a brief search of the car's interior and removed the suitcase from the back seat (Tr. 25). Upon opening the suitcase he observed wrapped bricks of green plant-like material which resembled marihuana (Tr. 26). The other suitcases were opened and contained similar bricks (Tr. 27). At trial 46 pounds of marihuana which had been seized were introduced into evidence (Tr. 223, 279-280, 305).

2. Petitioner contends here as below that the search of the suitcases containing the marihuana was improper because it was made without a warrant and was a search "incident" to the arrest. The officers clearly had probable cause to believe the suitcases contained marihuana and would have been negligent had they failed to detain them. Under these circumstances the doctrine of *Chambers* v. *Maroney*, 399 U.S. 42, is applicable. As this Court pointed out in *Chambers*, *supra*, at 52:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car

before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The court below properly relied on *Carroll* v. *United States*, 267 U.S. 132, 153, 155-156, where this Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" if the officer has probable cause to believe the contraband is present.

Petitioner's reliance on *Coolidge* v. *New Hampshire*, 403 U.S. 443, and *Chimel* v. *California*, 395 U.S. 752, is misplaced. In *Coolidge* the car taken without a valid search warrant was parked in the driveway of the house where the defendant was arrested and was seized two and one-half hours after the arrest. The circumstances in *Coolidge* are different from those in *Chambers* and the present case, since in *Coolidge* the car was not being used to transport contraband, there was no reason to believe that the evidence in the car would be destroyed, the defendant was in custody and therefore could not flee, and there was ample time to obtain the warrant. In addition, *Coolidge* involved a general exploratory search, while in the present case the officers were pursuing contraband drugs that they had probable cause to believe were concealed in the suitcases.

In these circumstances, petitioner's attempt to rely on *Chimel* is erroneous because it is not necessary to reach the question whether the search of the suitcases here was also permissibly "incident" to the arrest. In *Chimel*, the sole issue was whether a warrantless search of petitioner's entire house could be

justified solely on the theory that it was "incident" to his arrest. But as this Court noted (395 U.S. at 764, n. 9):

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." [Citations omitted.]

Here, the agent in charge of the arrest at the airport had less than three hours to notify other agents, meet them at the airport, and arrange a surveillance. Under these circumstances a warrant was not required. See *United States* v. *Duke,* 369 F. 2d 355 (C.A. 7), certiorari denied, 386 U.S. 934. *United States* v. *Mehciz,* 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974; *Draper* v. *United States,* 358 U.S. 307.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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